NO. 81-2347

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

VERNON S. BODDICKER, RICHARD W. PEAY, HUGH L. THOMPSON and DWIGHT G. HUDSON,

Petitioners,

vs.

ARIZONA STATE DENTAL ASSOCIATION, an Arizona Non-Profit Corporation; CENTRAL ARIZONA DENTAL SOCIETY, an Arizona Non-Profit Corporation; AMERICAN DENTAL ASSOCIATION, an Illinois Non-Profit Corporation,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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INDEX

Page

Reply Brief of Petitioners 1

TABLE OF AUTHORITIES CITED

Cases:

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 91 S.Ct. 1434 (1971) 5

Bogus v. American Speech & Hearing Association, 582 F.2d 277, 287, 289 (3rd Cir. 1978) 5,9

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 33, 99 S.Ct. 1551, 1569 (1979) 8

Bruszewski v. United States, 181 F.2d 419 (3rd Cir. 1950) 5

Katz v. Carte Blanche Corporation, 496 F.2d 747, 758-759 (3rd Cir. 1974) 5

Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1218 (9th Cir. 1977) 9

United States v. Realty Multi-List, Inc., 629 F.2d, 1351, 1364 (5th Cir. 1980) 9

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PETITIONERS' REPLY BRIEF

This Reply Brief is submitted on behalf of Petitioners pursuant to Rule 22.5, Rules of the Supreme Court of the United States, and is addressed to "arguments first raised in brief" of Respondents.

Respondents have, for the most part, made distorted observations concerning

the facts, with little or no supportive law, in an obvious effort to put the Petitioners in a bad light. Accordingly, we respond to statements and/or arguments submitted by Respondents, as follows (references are to pages of Respondents' Brief in Opposition):

Page 15: The statement that Dr. Boddicker presented a motion before the ASDA House to change the membership rules in order that ASDA members would not have to belong to ADA; that the proposal was voted down by the ASDA House; "and Dr. Boddicker never presented a similar proposal to the ADA House." Response: The fact of the matter is that Dr. Boddicker, in 1972, met with the then ADA president, and also Dr. Morrison, ADA Trustee from the 13th District, and discussed the same proposal with said representatives, to no avail. R. T. Vol. 1, p. 75, lines 7-23).

Pages 8, 15, 18, 24: Statement that this

action was filed by Petitioners only because of "political and philosophical objections to the Respondent organizations." Response: Without reciting actual testimony, the objections of plaintiffs is that the end result of the conduct, activities and principles of the Respondent organizations is the economic impact upon the practicing dentist, his patients, and the public at large; that the ADA has continued to promote the Dental Service Corporation and/or third party payment for dental care, as opposed to promoting excellence in dentistry on the part of the dentists as a corollary to preventive dentistry on the part of the general public.

Pages 10-12, 32-33: The statement that the Respondent organizations constitute a "federation." Response: This argument was raised, for the first time, in Respondents' brief in the Ninth Circuit,

and is an obvious effort to, belatedly, divert the Respondent organizations into divisions, of a single entity, rather than separate entities. However, the ADA has consistently denied any agency as to Respondents ASDA and CADS. Also, on page 29 of their Brief in Opposition, Respondents state:

> "The fact that we are dealing with membership organizations which could dissolve their membership arrangement with the ADA further undermines the coercion theory."

Also, each organization establishes its own membership dues, and each of the Respondents is a separate, distinct corporation and, as such, the conspiracy is maintained.

Pages 13-14, 24: Statement that the action is not a class action; was not brought pursuant to Rule 23 of the Federal Rules of Civil Procedure. Response: However, it must be noted that the action is brought by the Petitioners on behalf

of "all dentists similarly situated." Therefore, in the event of an adverse ruling as to the Plaintiffs' (Petitioners'), the judgment would only be binding upon the Plaintiffs', but not as to any other dentist "similarly situated." But, in the event of a judgment favorable to the Plaintiffs (Petitioners), the judgment would not only inure to the benefit of the Plaintiffs but would also bind the Defendants (Respondents), and particularly the Defendant ADA, in suits by other dentists "similarly situated." See Katz vs. Carte Blanche Corporation, 496 F.2d 747, 758-759 (3rd Cir. 1974); Bogus vs. American Speech & Hearing Association, 582 F.2d 277, 289 (3rd Cir. 1978); Blonder-Tongue Laboratories, Inc. vs. University of Illinois Foundation, 402 U.S. 313, 91 S. Ct. 1434 (1971); Bruszewski vs. United States, 181 F.2d 419 (3rd Cir. 1950).

Page 15: Statement that Dr. Boddicker

testified "that one need not belong to ADA to belong to dental specialty organizations. (R.T. Vol. 1, pp. 73-74), and that his loss of membership in a specialty organization was because of his voluntary conduct (R.T. Vol. 1, p. 82)."

Response: The fact of the matter is that Dr. Boddicker testified relative to his membership in the American Prosthodontic Society, as follows:

> "Question: But at that time did membership in the American Prosthodontic Society also require membership in the ADA?
>
> Answer: Oh, yes, I would have been dropped anyway."

R.T. Vol. 1, p. 82, lines 19-21. In addition, he testified that, since the filing of this law suit, the by-laws of the society had been changed where ADA membership is no longer necessary. R.T. Vol. 1, p. 73, line 4, p. 74, line 2.

Page 16: Statement that Dr. Boddicker "sold his practice in order to get a good

price for it before he became too old to maintain it." Response: Said statement is totally false. The testimony was:

> "A Well, I had seen a lot of older men who let their practice deteriorate as they gradually slowed up to where when they quit they could hardly get enough to pay for their equipment to sell their practice. So, I thought, well why not get a young man who would be willing to take it over so that I could get a substantial sum for my practice to do it, but with the agreement that I could practice as much or as little as I wanted to for a period of ten years. That way if I wanted to retire I could. If I wanted to work on for ten years and beyond, because, after all, that agreement has now ended, I could go back to practice tomorrow if I wanted to, and the agreement would not prohibit me from doing it." R.T., Vol. 1, p. 102.

Page 23: Statement that "Thus, the membership rule can have no adverse effect on the practice of dentistry in Arizona." Response: The fallacy of this statement is that the membership rule does not prevent a dentist from practicing, if he wants to forego membership in any of the Respondent organizations. The adverse

effect results when the dentist, desiring to belong to one of the Respondent organizations, is compelled to belong to all three organizations--on an all or none basis. The Respondents, instead of being competitive, have destroyed competition as between themselves. Thus, as stated in the dissenting opinion of Justice Stevens, in Broadcast Music, Inc. vs. Columbia Broadcasting System, Inc., 441 U.S. p. 33, 99 S. Ct. p. 1569:

> "In sum, the record demonstrates that the market at issue here is one that could be highly competitive, but is not competitive at all."

Pages 27-28: Respondents get into the economic aspect of leverage, coercion and foreclosure theories which, as stated, have no applicability in this matter, except for "coercion". However, each of the Respondent organizations condition purchase of its membership upon the additional purchase of membership in the other two

Respondent organizations. Therefore, no additional proof of "coercion" is necessary. Bogus vs. American Speech & Hearing Association, 582 F.2d 277, 287 (3rd Cir. 1978); United States vs. Realty Multi-List, Inc., 629 F.2d 1351, 1364 (5th Cir. 1980).

Page 39: Respondents' contention that "Petitioners failed to introduce any evidence whatsoever probative of a monopoly and thus raise no important question of federal monopoly law," followed by a statement that "Petitioners failed to define a relevant market, including both a product market and geographic market."

Response: Relevant geographic market has been defined as:

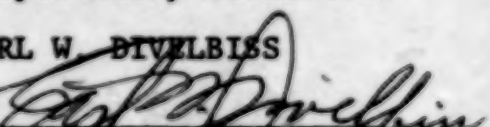
> " * * * The area of effective competition defined in terms of where buyers can turn for alternative sources of supply." Moore vs. Jas. H. Matthews & Co., 550 F.2d 1207, 1218 (9th Cir. 1977).

The crux of the definition is "where buyers can turn for alternative sources of supply." Here, there is no alternative

source of supply. The market for the sale of the ADA membership is all of the fifty states, plus any other locale where a constituent society of the ADA may exist. The market for the constituent and component societies (like the ASDA and CADS) is confined to their particular locale. As stated in our Petition (p. 9) the sole exception is that a dentist in the federal dental service (Army, Navy, VA, public health service) is allowed to obtain membership in the ADA, but without membership in a constituent or component society. Thus, the ADA, at least, gives recognition to a separate and distinct ADA membership.

Respectfully Submitted:

CARL W. DIVELBISS

By 

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